

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2004-316-C - ORDER NO. 2005-572  
OCTOBER 13, 2005

IN RE: Petition of BellSouth Telecommunications, ) ORDER DENYING  
Incorporated to Establish Generic Docket to ) MOTION AND  
Consider Amendments to Interconnection ) CROSS-MOTION  
Agreements Resulting from Changes of Law. )

This matter comes before the Public Service Commission of South Carolina (the Commission) for consideration of the Motion for Summary Judgment, or in the Alternative, Motion for Declaratory Ruling of BellSouth Telecommunications, Inc. (BellSouth), and, also, the Cross-Motion for Summary Judgment or Declaratory Ruling filed by the Competitive Carriers of the South, Inc. (CompSouth). Responses were also filed to both Motions, and Comments on BellSouth's Motion were filed by US LEC of South Carolina, Inc. (US LEC). Because of the reasoning as stated below, both the Motion and the Cross-Motion are denied.

With regard to the BellSouth Motion, BellSouth grouped its issues into two separate sections. The first section addressed issues which BellSouth claims can be completely resolved as a matter of law. The second section includes issues that have mixed questions of law and fact, and BellSouth is asking this Commission to "state what the law is." As BellSouth notes, this case began when BellSouth filed a Petition to Establish Generic Docket to consider amendments to interconnection agreements resulting from changes of law. BellSouth's petition sought to require the amendment of

existing interconnection agreements to effectuate the Federal Communications Commission's (FCC's) *Triennial Review Order* and *Triennial Review Remand Order* (TRO/TRRO) and to resolve any disputes arising out of such orders that may be raised in pending negotiations or arbitrations. BellSouth states a belief that the disputes that have arisen between the parties involve legal questions that can and should be resolved as a matter of law prior to a hearing. BellSouth also states that by declaring what the law is, the Commission can provide needed guidance to the parties for the implementation of interconnection agreement amendments. BellSouth also cites the efficient use of Commission resources and making the most of the parties' limited resources as policy reasons to grant the BellSouth Motion.

CompSouth points out that BellSouth explicitly states that it "is not asking the Commission to adopt specific contractual language." CompSouth argues that BellSouth would have the Commission rule on the complex legal and policy issues raised by the TRO/TRRO in a vacuum, without consideration of the actual contractual disputes that give the issues substance in the real world. Further, CompSouth states that, if this Commission ruled on BellSouth's Motion, this Commission would be faced with possible interlocutory appeals of its decision, and would still be required to resolve disputes over the specific contract language implementing this Commission's decision on the overarching legal or policy issue. CompSouth states that this Commission declaring what the law is will not necessarily or probably resolve the particular contract language disputes that are keeping the parties from resolving TRO/TRRO issues on a negotiated basis. Accordingly, CompSouth views BellSouth's Motion as an invitation to do the work

twice. CompSouth goes on to state that, as with most disputes, the Commission's decisions will be best informed if the Commission and Staff have the opportunity to review the testimony of witnesses, consider responses to cross-examination, and ask questions of witnesses and counsel at a hearing. Finally, CompSouth recommends that this Commission proceed to hearing on the disputed issues identified for resolution by the parties in this docket.

However, CompSouth states that, if the Commission is inclined to grant summary judgment or issue declaratory rulings at this stage of the proceeding, that it should grant CompSouth's Cross-Motion instead. Basically, CompSouth declares that it does not agree with the categorization of issues that BellSouth uses to organize its Motion. Further, CompSouth plainly disagrees with BellSouth's arguments on the matters at issue.

US LEC also submitted a response to BellSouth's Motion. Basically, US LEC alleges that BellSouth's Motion would effectively short-circuit the process that the parties agreed upon to resolve the disputed issues in this proceeding and would eliminate the opportunity of each party to present its comprehensive position to the Commission. Further, US LEC noted that the possibility of a piecemeal adjudication of the issues could lead to reconsideration petitions and/or appeals that would unduly complicate and potentially delay the resolution of the remaining issues.

We deny both the Motion and the Cross-Motion. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In the present case, there is no doubt that CompSouth disputes even the attempted categorization of the issues before the Commission, not to

mention BellSouth's arguments on the issues presented. There appear to be overarching issues of material fact involved.

A good example of such issues would be BellSouth's first proposed issue for summary judgment. It reads as follows: Are HDSL-capable copper loops the equivalent of DS 1 loops for the purpose of evaluating impairment? BellSouth's position is that, as a matter of law, the FCC has declared that an HDSL loop is the equivalent of a DS 1 loop. BellSouth Motion at 8. In contrast, CompSouth declares that the FCC did not conclusively hold that HDSL-capable copper loops are the same thing as DS 1 loops. CompSouth Response and Cross-Motion at 6. Specifically, CompSouth argues that "BellSouth's position on this issue highlights the dangers that state commissions always face in making 'legal determinations' without evidence related to the technical terms involved in the issue" and that the Commission "should refrain from ruling on this issue until it can hear from witnesses who are qualified to describe the characteristics of HDSL-capable copper loops, DS1 lines, and how those terms relate to the technical definitions adopted by the FCC in the TRRO." CompSouth Response and Cross-Motion at 7. Clearly, we have an issue of material fact.

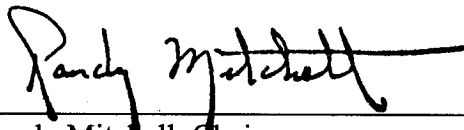
Similar issues of material fact are in evidence for the remainder of BellSouth's proposed issues for summary judgment. As stated by CompSouth, the parties' proposed issues for summary judgment "will, as is inevitable in the telecommunications world, involve mixed questions of policy, law, and fact" (CompSouth Response and Cross-Motion at 3). Because those issues of fact appear to be material, the portions of both the Motion and Cross-Motion that request Summary Judgment must be denied.

Further, for policy reasons, the portions of the Motion and Cross-Motion for Declaratory Rulings must also be denied. We believe that our decision will be best informed if we have the benefit of the testimony of witnesses and the responses to cross-examination before us in this case, so that we can make appropriate decisions.

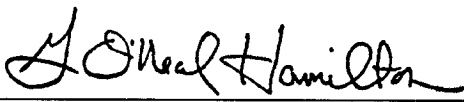
This Commission also believes that if the Motion and Cross-Motion were granted in general, we would end up with a piecemeal adjudication of the issues, since reconsideration requests and Court appeals would likely be the result. This would certainly delay the complete resolution of the issues. We believe that the best solution is to deny the Motion and Cross-Motion and proceed with the hearing on the matter. We so hold.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
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Randy Mitchell, Chairman

ATTEST:

  
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G. O'Neal Hamilton, Vice-Chairman

(SEAL)